IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Bajrang Lal & ors. vs. Shri Narain

S.B. Civil Second Appeal No.98/1985 against the judgment and decree dated 11.4.1985 passed by the learned Addl. District Judge, Nagaur camp Deedwana in Civil First Appeal No.33/81.

Date of Judgment: March 19, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms. J.K. Bhaiya, for the appellants.
Mr. N.S. Rajpurohit for Mr. S.G. Ojha, for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

This appeal is against the judgment and decree dated 11.4.1985 by which the first appellate court allowed the first appeal filed by the plaintiff and decreed the suit of the plaintiff for possession after reversing the judgment and decree of the trial court dated 28.3.1977 by which the trial court dismissed the plaintiff's Civil Original Suit No.31/71.

Brief facts of the case are that one Narain claiming himself to be the owner of the big property claimed that in the said big property, full description has been given in para 1 of the plaint, one small room

(kothari) is in possession of Agarwal Sammelan Deedwana since 1.7.1962. They are not paying mesne profits to the plaintiff nor they executed any deed to continue in possession, therefore, the plaintiff served a notice upon the President of the said Agarwal Sammelan Deedwana(defendant) on 5.11.1970 and claimed that the possession of the said Kothari be delivered to the plaintiff and the compensation for use and occupation may also be awarded to the plaintiff. Since the said Agarwal Sammelan Deedwana was unregistered society, therefore, the plaintiff filed the suit under Order 1 Rule 8,C.P.C. The notices under Order 1 Rule 8,C.P.C. were also issued by the order of the trial court dated 17.3.1972 and after service , no other defendant came to contest the suit. The plaintiff claimed that he being owner of the property, is entitled to decree for possession and also entitled to mesne profits @ 10/ per month. The plaintiff claimed arrears of mesne profit of Rs.2000/- along with possession of the suit property by filing suit as back as on 22.1.1971.

The defendants who were representing the said Agarwal Sammelan Deedwana, submitted written statement and they specifically denied the ownership of the plaintiff in the property in dispute and stated that the Agarwal Sammelan Deedwana is not in possession of the suit property since 1.7.1962 but they started using the said *Kothari* from the time of inception of the Agarwal Sammelan Deedwana and that

is from 7.10.1956. It will be worthwhile to mention here that in the amended written statement in para 16 of the written statement, the defendants very specifically admitted that the entire property was constructed by firm Ram Pratap Khajuwala Lohia and this property is known as *Dharamshala* . The defendants very specifically admitted that in the property of firm Ram Pratap Khajuwala Lohia, in addition to plaintiff, there are more co-sharers who are Raghunath, Narain, Heera Lal and Jagannath. After admitting the plaintiff as co-owner, it is stated that since suit has been filed by only one of the co-owners of the property, therefore, the plaintiff's suit is not maintainable. It will be further worthwhile to mention here that the defendants did not claim their adverse possession over the property in dispute by specifically stating therein that the defendants are in possession of the said Kothari claiming themselves to be owners and claiming hostile title against the plaintiff. The trial court framed the issues which are whether the Kothari in the building was taken by Agarwal Sammelan Deedwana from 1.7.1962, whether the mesne profits for the said kothari can be Rs.10/- per month and whether the plaintiff is entitled to relief of arrears of mesne profits and possession. On the pleas taken by the defendants, issues were framed whether the suit was barred by time and whether Raghunath, Narain and Jagannath are the necessary parties in the suit and whether the said kothari is in possession of Agarwal Sammelan

Deedwana since creatin of Agarwal Sammelan Deedwana.

In the trial court, the plaintiff gave his statement as PW-1 and produced PW-2 Shri Niwas, PW-3 Hari Shanker, PW-4 Rameshwar Lal, PW-5 Bhanwar Lal,PW-6 Bhanwarlal Agarwal and PW-7 Prem Sukh. Several documents were also produced by the plaintiff, whereas the defendant gave his statement as DW-1 and produced the witnesses DW-2 Ram Gopal, DW-3 Jawala Dutta, DW-4 Ram Kumar, DW-5 Bhanwar Lal, DW-6 Sita Ram, DW-7 Chhoga Lal, DW-8 Bhanwar Lal, DW-9 Bajrang Lal,DW-10 Raghu Nath, DW-11 Jagannath, DW-12 Kamaluddin and DW-13 Govind Prasad. The defendants also produced the documentary evidence also.

The trial court in its judgment dated 28.3.1977 after considering the evidence of both the parties, decided issue no.1 and 6 against the plaintiff-appellant and held that the plaintiff failed to prove that the suit property was given to the defendants by the plaintiff and, therefore, the defendants or the Agarwal Sammelan Deedwana is the licensee. This finding was recorded because of some contradictions in the evidence of the plaintiff and his witnesses and on the ground that there is variance between the pleadings and proof. While deciding issue no.6, the trial court held that the other co-sharers have not been impleaded as parties, therefore, the suit of the plaintiff is not maintainable. However, so far as mesne profits is concerned, the trial

court held that mesne profits for the *Kothari* as on relevant date was Rs.10/- per month. The trial court very specifically while deciding issue no.7, held that the witnesses of the defendants on this issue gave absolutely false statement. The trial court held that the defendants failed to prove their ownership for the property in dispute and the defendants' witnesses admitted that the plaintiff is one of the co-sharers.

The plaintiff preferred first appeal which was allowed by the first appellate court vide judgment and decree dated 11.4.1985.The first appellate court held that it is virtually admitted case that the plaintiff is co-owner of the property in dispute and as co-owner, he could have filed the suit for possession against the person who is in possession of the suit property and is continuing against the wishes of the plaintiff. The first appellate court based its finding on the statement of the witnesses produced by the defendants who virtually admitted that the property was belonging to the plaintiff's family and it was being managed by one Prem Sukh and the property which was managed by Prem Sukh, was admitted by almost all the witnesses of the defendants. The first appellate court also approved the finding of the trial court that the defendants failed to prove their title to the property and also failed in proving their adverse possession. However, the first appellate court, at one place, observed that even if the defendant or the Agarwal

Sammelan Deedwana was tenant in the suit property of the said kothari then the plaintiff could have been entitled to decree under the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 on the ground of denial of title. The first appellate court, after reversing the finding on issue nos. 1 and 6, decreed the suit for possession in favour of the plaintiff. Hence this second appeal.

The learned counsel for the appellants vehemently submitted that the plaintiff filed the suit for possession but did not implead his co-sharers and this fact is admitted by the plaintiff as well as the two witnesses produced by the defendants. According to the learned counsel for the appellants, the first appellate court decided issue no.2 in the manner holding that the rent for the suit property can be Rs.10/- then the plaintiff should not have been granted decree for possession against the tenant when the suit has not been filed under the provisions of the Act of 1950. The learned counsel for the appellant also submitted that it is also clear from the evidence that the appellant-the Agarwal Sammelan Deedwana is in possession in the suit property in their own right and that is also from the year 1956. The plaintiff nowhere stated in his plaint that the Agarwal Sammelan Deedwana was given no license to occupy the disputed premises. In view of the above, when there is no case of licence then the court should not have decreed the suit for possession against the defendants.

The learned counsel for the respondent pointed out that the first appellate court considered the evidence in detail and thereafter recorded finding of fact in favour of the appellant about the maintainability of the suit as well as about the fact that the plaintiff is owner of the property and further that the defendants or the Agarwal Sammelan Deedwana are neither the owners of the property nor they proved their hostile title against the plaintiff and, therefore, there is no reason for the first appellate court for not granting the decree for possession. It is also submitted that in second appeal, in fact, no substantial question of law arises.

Following substantial questions of law were framed by this Court while admitting this appeal on 8.7.1985:-

> "1. Whether the appellate court has not considered the variance between the pleadings in the plaint and the evidence led by the plaintiff and is thus not right in reversing the judgment of the trial court.
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> 2. Whether in the case where the suit has been filed on the ground of the defendant being a trespasser, the appellate court was right in holding that the defendants are liable for eviction under the Rajasthan Premises (Control of Rent and Eviction) Act, 1950.
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> 3. Whether the appellate court was not right in giving the finding that the co-sharers of the property were not necessary parties in the case."

The first substantial question of law is about the appellant's

contention that there is a variance between the pleadings in the plaint and the evidence led by the plaintiff and, therefore, the judgment of the first appellate court cannot be sustained. The variance in pleading, according to the appellant, is that the plaintiff nowhere pleaded that the defendants or the Agarwal Sammelan Deedwana was licensee in the suit property. Contrary to it, it is stated that rent of the suit property was Rs.10/- per month but it is not a case of eviction of the tenant filed by the plaintiff-landlord on the grounds under Section 13(1) of the Act of 1950. The contention of the appellant is devoid of any force. The plaintiff's entire case is that the defendant occupied one *kothari* of the plaintiff's property on 1.7.1962. The plaintiff claimed that the defendants are not paying the rent nor they are executing the deed in favour of the plaintiff. For this contention, the plaintiff not only gave his statement but produced the person Prem Sukh (PW-7) who was admittedly managing the entire property including the Kothari in question. The defendants also nowhere stated in their written statement that they are in occupation of *Kothari* by exercising their any lawful right. Virtually it is case of no contest so far as permissive possession of the defendant-the Agarwal Sammelan Deedwana is concerned, because of the simple reason that in the written statement, the defendants in para 16 very specifically admitted the ownership of the property and belonging it to the plaintiff. Though the defendants

pleaded that there are other co-sharers but that is of no consequence. The possession, howsoever long it may be, it is not adverse to the interest of the owner of the property for claiming title on the basis of adverse possession unless the possession is with intention to and in the knowledge of the true owner challenging title of the owner for sufficient period of time. One is required to plead and prove that he in defiance of the title of the other party, remained in occupation of the suit property and that defiance was in the knowledge of the true owner and it continued for more than 12 years. In the entire written statement, the defendants' contention is that the defendants are in occupation of the said Kothari since 1956 and they nowhere pleaded in the written statement that they ever disowned the title of the plaintiff. Not only this, as stated above, the title of the plaintiff was even not challenged in the written statement on the strength of defendant's adverse possession but in fact it has been admitted as on the date when the suit was filed because the defendants stated that apart from the plaintiff, there are more co-sharers of property in dispute on the date of the filing of the suit. Therefore, substantial question of law no.1 is decided against the appellant.

The first appellate court in its judgment, at one place, observed that the plaintiff would have been entitled to decree for possession even if the defendant or the Agarwal Sammelan Deedwana would have

been the tenant in the suit property because the defendants, on behalf of the Agarwal Sammelan Deedwana, denied the title of the plaintiff. Because of that observation, a substantial question of law no. 2 has been framed. For this, according to the learned counsel for the appellant, there is a specific evidence on record of DW-7, who clearly stated that the rent was paid for the Kothari in question. The observation of the first appellate court is not the decision in favour of the defendants holding the defendants to be the tenant. Not only this, the observation was irrelevant because of the reason that even the defendant's case is that the defendant is tenant in the suit property. Therefore, the substantial question of law no. 2 does not arise in the present facts of the case.

Substantial question of law no.3 is on the defendant's objection that the suit was not maintainable as the co-sharers have not been impleaded. It is settled law that any of the co-sharers can get the decree for possession of the suit property which is in occupation of person who had no right or authority to continue in possession. In this case there is concurrent finding of fact that the plaintiff is owner of the property being co-sharer in the suit property. The defendants who, admittedly are not owners of the property and failed to prove their adverse possession, therefore, in the facts and circumstances of the case, the first appellate court rightly reversed the finding of the trial

court on issue no.6 and rightly held that the suit is not liable to be dismissed because of non-joinder of the necessary party. It will be further worthwhile to mention here that after going through the statements of the defendant as well as defendant's witnesses, this Court is of the view that the defendants in fact admitted the ownership of the plaintiff for the property in dispute as well as the plaintiff's possession over the entire property and appointing of Prem Sukh as a person to manage the affairs of the property, the nature of the property described as *Dharamshala* is of no consequence because of the reason that the defendants are in occupation of the suit property as licensee and thereafter as trespassers only. In view of above, substantial question of law no.3 is also decided against the appellant.

Hence there is no merit in this appeal and the appeal of the appellant is dismissed.

(**PRAKASH TATIA),J.**

mlt.